UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

S.M.S.R., *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants.

Civil Action No. 1:18-cv-02838

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

The Immigration and Nationality Act (INA) guarantees "any alien" the right to seek asylum "whether or not [she arrived] at a designated port of arrival" and "irrespective of [her] status." 11 U.S.C. § 1158(a)(1). The Executive Branch has issued a policy preventing any alien who enters outside "a designated port of arrival" on the southern border from seeking asylum. *See Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (the "Rule"); Proclamation No. 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018) (the "Proclamation"). The conflict between the statute and the policy is plain, as the Ninth Circuit recently found. *East Bay Sanctuary Covenant v. Trump*, No. 18-17274, 2018 WL 6428204 (9th Cir. Dec. 7, 2018). And that statutory violation is not all: In promulgating the Rule, the Government contravened the Nation's international obligations, improperly dispensed with the bedrock procedural requirements of the Administrative Procedure Act (APA), and failed to provide a reasoned explanation for its issuance.

The Government's attempts to defend the Rule's manifold legal flaws come up short. The Government first pivots to procedure, claiming that 8 U.S.C. § 1252 divests this Court of jurisdiction. That is incorrect: This case does not seek judicial review of an "an order of removal," *id.* § 1252(a)(5). Moreover, the question of whether the regulation is lawful does not "aris[e] from" an "action taken . . . to remove an alien" or from a removal "proceeding" itself, *id.* § 1252(b)(9), and the Supreme Court has recently cautioned against an "expansive interpretation" of this provision that would unduly circumscribe judicial review, *Jennings v. Rodriguez*, 138 S Ct. 830, 840 (2018). When it gets to the substance, the Government suggests that the Rule and Proclamation are legal because they do not prevent anyone from *applying* for asylum, but just prevent refugees from *getting* asylum. The Ninth Circuit easily rejected that claim: "It is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically ineligible for asylum based on precisely that fact." *East Bay*, 2018 WL 6428204, at *15. The Government's other arguments similarly fail to reconcile the Rule with the statutory text.

Plaintiffs do not gainsay the administrative difficulties caused by the increase in asylum applications over the past decade. But the President's power to execute the law "does not include a power to revise clear statutory terms." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). "[R]evision of the laws is left with the branch that enacted the laws in the first place—Congress." *East Bay*, 2018 WL 6428204, at *18. Because the Rule is an Executive attempt to usurp that power, and because the other equitable factors are satisfied, Plaintiffs' motion for a temporary restraining order should be granted.

ARGUMENT

I. Plaintiffs' Claims Are Justiciable.

A. This Court Has Jurisdiction Over Plaintiffs' Claims.

This Court has federal question jurisdiction over Plaintiffs' suit. Each of their claims alleges a violation of federal statutes or the Constitution as 28 U.S.C. § 1331 requires. Even the Government does not dispute that the organizational Plaintiffs may invoke the Court's jurisdiction under this provision. The Government contends, however, that 8 U.S.C. § 1252(a)(5) and (b)(9) strip this court of jurisdiction over the individual Plaintiffs' claims. Opp. 12-14. That is incorrect.

Section 1252(a)(5) is plainly irrelevant. That provision states that a petition before a court of appeals is the "sole and exclusive means for judicial review of *an order of removal*." But none of the Plaintiffs seeks review of "an order of removal," and neither the individual Plaintiffs nor the members of the putative class have received such an order. Therefore, by its terms, Section 1252(a)(5) does not apply.

The Government attempts to evade that difficulty by asserting that the individual Plaintiffs' claims are unreviewable until they obtain an order of removal, because Section 1252(b)(9) channels all "questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien" into "judicial review of a final order." But that misunderstands both the nature of Plaintiffs' claims and the meaning of Section 1252(b)(9).

Plaintiffs challenge a regulation that "governs eligibility for asylum and screening

procedures for aliens subject to a presidential proclamation." 83 Fed. Reg. at 55,934. The question of whether that regulation is lawful does not "aris[e] from" an "action taken . . . to remove an alien" or from a removal proceeding itself. 8 U.S.C. § 1252(b)(9). By its own admission, the Government has not yet determined whether Plaintiffs S.M.S.R. and R.S.P.S. are removable, and therefore has not taken any action to remove them.[1] And, while the Government claims that it initiated removal proceedings by serving the individual Plaintiffs with Notices to Appear ("NTA"), this challenge to the Rule cannot possibly have "arise[n]" from those proceedings given that they were issued only after the Rule's enjoinder and that at least one and likely both of them are procedurally invalid.[2] The simple fact is that Plaintiffs' challenge—like most APA suits challenging a newly promulgated rule—arose from the Government's issuance of an unlawful regulation that directly affects their substantive rights.

The Government contends that the individual Plaintiffs' claims are nonetheless barred because asylum claims are sometimes—but not always, *see* 8 U.S.C. § 1158(d)(1)—asserted in removal proceedings, and that Section 1252(b)(9) should be read to "channel all issues . . . that *can be* raised in" removal proceedings into a petition for review of a final order of removal. Opp. 13 (emphasis added). The statute's language, however, cannot be stretched so far: It explicitly governs only those questions of law "arising from an action *taken* or proceeding

[1] Moreover, the Supreme Court has expressed doubt as to whether an action taken in conjunction with an "asylum application[]" can properly be deemed an "action taken . . . to remove" aliens, *Jennings*, 138 S Ct. at 840 & n.2, presumably because the asylum process governs the terms by which an alien can *remain* in the country, which is the very opposite of removal.

[2] In *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), the Supreme Court held that a document cannot qualify as a NTA under 8 U.S.C. § 1229(a) if it "fails to designate the specific time or place of the noncitizen's removal proceedings." *Id.* at 2114. S.M.S.R.'s NTA does not list a "time and place" of hearing, *id.* (citing 8 U.S.C. § 1229(a)(1)(G)(i)), and does not even append a signed certificate of service. Ex. 1, Welborn Decl. ¶ 4; Ex. A thereto (NTA); *see also Pereira*, 138 S. Ct. at 2113-14. Moreover, to counsel's knowledge, neither of Plaintiffs' NTAs has been filed with any immigration court, Welborn Decl. ¶¶ 5-6, so it remains within the Government's discretion to cancel the NTAs on the grounds that they were "improvidently issued," particularly were the Rule to go into effect. 8 C.F.R. § 239.2(a)(6); *In re W-C-B-*, 24 I. & N. Dec. 118, 122 (BIA 2007); *see also* 8 C.F.R. § 239.2(c) (Government may move to dismiss NTA after Section 240 proceedings commence).

brought." 8 U.S.C. § 1252(b)(9) (emphases added). The use of the past tense forecloses the Government's attempt to make Section 1252(b)(9) cover any issue that might arise in connection with an action or proceeding that has not yet occurred. Moreover, under the Government's formulation, a vast array of issues with only the slightest relation to removal might be brought into Section 1252(b)(9)'s ambit because they "*can be*" raised in removal proceedings. But in *Jennings*, the Supreme Court cautioned against an "expansive interpretation" of Section 1252(b)(9) that would "cram[ ] judicial review" of a host of "questions into the review of final removal orders." 138 S. Ct. at 840.

Further, the Government's interpretation of Section 1252(b)(9) could impermissibly render many aliens' challenges to the Rule "effectively unreviewable." *Id.* *Jennings* declined to hold that Section 1252(b)(9) covered claims brought by a class of aliens challenging their detention during removal proceedings in large part because of the possibility that "no [order of removal] would ever be entered in a particular case, depriving that detainee of any meaningful chance for judicial review" of the harms inflicted by the detention policy. *Id.* Precisely the same concern applies here. Many aliens who are subject to the Rule may never receive a final order of removal because, while such aliens are ineligible for asylum, they remain eligible for "withholding of removal" and protection from removal under the Convention Against Torture ("CAT"). 83 Fed. Reg. at 55,943. Either of these alternate forms of relief may prevent the issuance of a final "order of removal," and thus may prevent an alien from obtaining judicial review under Section 1252(b) of her asylum denial and the unlawful Rule that prompted it. Indeed, while other courts have been more willing to deem an order *withholding* removal to be a final order of removal, the Ninth Circuit has repeatedly held that it lacks jurisdiction under Section 1252(b) to review the outcome of a removal proceeding in which the Board of Immigration Appeals ("BIA") has denied asylum but granted withholding of removal, because an alien in that situation "is not subject to a 'final order of removal'" under Section 1252(b). *Zeng v. INS*, 83 F. App'x 264, 2003 WL 22977463, at *1 (9th Cir. 2003); *see also Karshe v. Gonzales*, 161 F. App'x 726, 2006 WL 64426, at *1 (9th Cir. 2006) (same).

Depriving an alien in this situation of her ability to challenge the Rule deprives her of judicial review of a significant deprivation, because asylum carries with it a slew of benefits that are not available to an alien who is granted withholding of removal or protections under the CAT. For example, withholding of removal and CAT protection do not provide noncitizens with the derivative eligibility for spouses and children, 8 U.S.C. § 1158(b)(3), and pathways to permanent residence and citizenship, *id.* §§ 1159(b), 1427(a), that asylum provides. *See also East Bay*, 2018 WL 6428204, at *6 (listing unique statutory benefits of asylum). Adopting the Government's reading of Section 1252(b) therefore would run contrary to the fundamental "presumption in favor of judicial review, which "may be overcome only upon a showing of clear and convincing evidence of a contrary legislative intent." *Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 132 F.3d 775, 778 (D.C. Cir. 1998); *see also Jafarzadeh v. Duke*, 270 F.Supp.3d 296, 311 (D.D.C. 2017) (declining to apply Section 1252(a)(5) and 1252(b)(9) where doing so would preclude "effective judicial review" of Plaintiffs' claims).

Nor is the Government's position compelled by the cases it cites. None of the precedential cases involves a challenge to rules governing eligibility for asylum.[3] Instead, they largely concern claims implicating the plaintiffs' ability to defend themselves in removal proceedings. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029 (9th Cir. 2016) (challenging deprivations of the right to counsel in removal proceedings); *Aguilar v. I.C.E.*, 510 F.3d 1, 14 (1st Cir. 2007) (same); *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 75 (D.D.C. 2018) (challenging access to law library to defend against removal). Of course, a claim challenging the procedures

[3] The Government cites a D.C. Circuit opinion from 1988 implicating a challenge to an asylum policy, but it is a non-precedential opinion from an *en banc* decision in which the court of appeals affirmed by an equally divided court. *See Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499, 1518 (D.C. Cir. 1988). The Government neglects to note as much, but the oversight is immaterial because the case has no bearing on the proper interpretation of Section 1252(b)(9), and in fact was released many years before the provision was even codified. The Government also cites a Second Circuit case governing an individual alien's attempt to obtain mandamus of a refusal to reopen a denied asylum application, *see* Opp. 14 (citing *Delgado v. Quarantillo*, 643 F.3d 52, 54 (2d Cir. 2011)), but that decision is equally far afield because it involves a challenge to a particular denial of asylum and the attendant removal.

for contesting removal is much more likely to "aris[e] from" a removal proceeding than a claim challenging a regulation regarding asylum eligibility.

Finally, even if the Government were correct in its interpretation of Section 1252(a)(5) and (b)(9), that would not block jurisdiction over this case for two reasons. First, if the individual Plaintiffs' claims "aris[e] from" any form of removal proceeding (which they do not), it is the expedited removal proceedings referenced in Section 1252(e). Before the injunction was in place, the individual Plaintiffs were briefly subject to expedited removal proceedings governed by the Rule. That exposure would trigger the review provisions of Section 1252(e), rather than the provisions of Section 1252(a) and (b). And Section 1252(e)(3) permits courts to review and enjoin a regulation alleged to violate the INA. Second, Section 1252 does not apply to the organizational Plaintiffs, and the Government never contends otherwise. At minimum, the organizational Plaintiffs' claims must be heard.

B. Plaintiffs Have Standing.

1. Individual Plaintiffs. There can be no serious question that migrants seeking asylum have standing to challenge a rule categorically barring them from eligibility contrary to statutory guarantees. The Government briefly suggests that S.M.S.R. and R.S.P.S. cannot "establish any imminent injury attributable to the rule or proclamation" because they received NTAs and are "now in full immigration proceedings" under Section 240 of the INA. Opp. 15. That is inaccurate, *see supra* n. 2, and it is also immaterial. The Rule makes S.M.S.R. and R.S.P.S. categorically ineligible for asylum, and the Government has made clear that it would invoke the Rule to deny them asylum if the *East Bay* injunction is lifted. The individual Plaintiffs therefore would face "certainly impending" injury if the Rule were permitted to go into effect. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013).

The existence of the *East Bay* injunction is insufficient to defeat standing. Courts routinely issue parallel injunctions against policies that place plaintiffs at risk of imminent and irreparable harm in multiple jurisdictions. *See, e.g.*, *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011) (entering declaratory judgment finding

Affordable Care Act's individual mandate unlawful) *aff'd in part, rev'd in part on other grounds*, 648 F.3d 1235 (11th Cir. 2011); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 811 F. Supp. 2d 1086 (M.D. Pa. 2011) (same).[4] Notably, in *Trump v. International Refugee Assistance Project*, the Supreme Court partially denied a request to stay duplicative injunctions without ever suggesting that jurisdiction was lacking for the issuance of the second injunction. *See* 137 S. Ct. 2080, 2084, 2087-88 (2017) (per curiam). And it is particularly important for Plaintiffs to receive injunctive relief in this case because the *East Bay* injunction expires by its own terms on December 19, 2018, and Defendants are pursuing every avenue to stay that injunction on an emergency basis. *See* Application for Stay Pending Appeal, *Trump v. East Bay Sanctuary Covenant*, No. 18A615 (U.S. Dec. 11, 2018).

2. Organizational Plaintiffs. CAIR Coalition and RAICES also have Article III standing to challenge the Rule and fall within the relevant zone of interests. The organizations already have suffered and, absent an injunction, will continue to suffer "concrete and demonstrable" injuries that are directly traceable to the Rule. *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) ("*PETA*"). As Judge Bybee held in *East Bay*, organizations that serve aliens affected by the rule have standing because, among other reasons, the Rule "will require" them to revise program offerings and training materials, "will divert resources" from other initiatives, and "will cause them" to lose funding. 2018 WL 6428204, at *11-12. The Government asserts that the Rule will not "injure[] [Plaintiffs'] interest in promoting [their] mission" to assist asylum seekers. Opp. 16 (quoting *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) ("*ASPCA*")). But the requirement that a challenged policy conflict with an organization's mission does not mean that the policy must prevent the organization from carrying out its mission *at all*. *See PETA*, 797 F.3d at 1094 (finding standing where government conduct

[4] The cases cited by the Government in which courts elected to stay their own proceedings pending the resolution of similar cases in which injunctions had been issued, Opp. 39, do not stand for the proposition that courts *lack authority* to issue a parallel order when an injunction is in place. Furthermore, the Government has not moved for any stay of these proceedings.

"inhibit[ed] . . . [organization's] daily operations"). Plaintiffs have amply documented the ways the Rule increases the resources necessary to serve clients affected by the order, and thus diminishes the organizations' ability to serve other asylum seekers as their mission requires. *See* Compl. ¶¶ 132, 139, 163; Cubas Decl. ¶¶ 22-29, 34; Garza Pareja Decl. ¶¶ 17-19, 27, 31-32.

The Government is similarly mistaken in its assertion that Plaintiffs have insufficiently explained how the organizations have "'used [their] resources to counteract'" their injuries. Opp. 16 (quoting *ASPCA*, 659 F.3d at 25). Both organizations have submitted declarations providing detailed descriptions of how they have been forced to divert resources because of the Rule. Compl. ¶¶ 139-142, 149, 151, 162, 166-167; Cubas Decl. ¶¶ 15-17, 19, 28, 30; Garza Pareja Decl. ¶¶ 6, 14, 17, 31. These harms are not "self-inflicted" injuries incurred in "litigation" against the Rule, Opp. 17-18, 42; they are expenses incurred in addressing the *effects* of the Rule. And as the Government evidently recognizes, CAIR Coalition and RAICES suffered additional injury when they were deprived of the opportunity to comment on the Rule. *See* Opp. 18, 41.

CAIR Coalition and RAICES also fall within the zone of interests Congress sought to protect in the Refugee Act. The zone of interests test is "not especially demanding" and forecloses suit only when a plaintiff's interests are "marginally related to or inconsistent with" the purposes of the statute. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014). Congress need not have intended to benefit particular plaintiffs, nor is it necessary for them to be "the subject of the contested regulatory action." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). Here, the organizational Plaintiffs' interest in providing legal services to asylum seekers is more than "marginally related" to the asylum statutes' purpose of establishing statutory procedures for granting asylum. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 427-28 (1987). Indeed, multiple provisions of the statute explicitly contemplate that legal services organizations will be involved in implementing the INA's procedures to assist asylum seekers. *See East Bay*, 2018 WL 6428204, at *13 (citing 8 U.S.C. §§ 1158(d)(4)(A)-(B), 1101(i)(1), 1184(p)(3)(A), 1228(a)(2), (b)(4)(B), 1229(a)(1), (b)(2), 1443(h))). In light of the APA's "generous review provisions" and the fact that "the benefit of any doubt goes to the

plaintiff," that is more than sufficient to demonstrate that CAIR Coalition and RAICES fall within the INA's zone of interests. *Lexmark*, 572 U.S. at 130.[5]

II. Plaintiffs' Claims Are Likely To Succeed On The Merits.

A. The Rule Violates Section 1158(a)(1).

Section 1158(a) provides that "[a]ny alien who is physically present in the United States or who arrives in the United States . . . *whether or not at a designated port of arrival* . . . [and] irrespective of such alien's status, may apply for asylum." 8 U.S.C. § 1158(a). The Rule and Proclamation fly in the face of that command: They condition an alien's ability to obtain asylum on one of the precise characteristics—manner of entry—that Congress said could *not* be the basis for depriving someone the right to seek asylum. The Government's various attempts to defend its overtly countertextual position fall flat.

1. The Government first doubles down on its distinction between an "alien's ability *to apply* for asylum and the Executive's authority *to deny* asylum." Opp. 21 (emphasis in original). The Government agrees that an alien cannot be denied the right to apply for asylum because she entered outside of a port of arrival, but maintains that she can categorically be denied asylum on that exact basis. As the Ninth Circuit explained, his purported distinction cannot withstand even a modicum of scrutiny: "It is the hollowest of rights that an alien must be allowed to apply for asylum regardless of whether she arrived through a port of entry if another rule makes her categorically ineligible for asylum based on precisely that fact." *East Bay*, 2018 WL 6428204, at *15. The practical effect of the Rule and Proclamation is *identical* to a policy that prohibits an alien from applying if she entered outside a port of arrival. And "[t]he technical differences between applying for and eligibility for asylum are of no consequence to a refugee when the

[5] *INS v. Legalization Assistance Project of the Los Angeles County Federation of Labor*, 510 U.S. 1301 (1993) (O'Connor, J., in chambers) and *Federation for American Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 900 (D.C. Cir. 1996) are inapposite. Neither statute involved the asylum laws, which specifically contemplate a role for legal service providers. And those cases involved injuries that were only tangentially related to the underlying provisions: conserving organizational resources to serve nonimmigrants, 510 U.S. at 1303-04, and increased competition for jobs from immigrants, 93 F.3d at 903.

bottom line—no possibility of asylum—is the same." *Id.*

The Government attaches some weight to the fact that the question of who may apply for asylum is addressed in a separate subsection, § 1158(a), from exclusions to eligibility, § 1158(b). But that structure in no way suggests that the Executive Branch can hollow out a specific right to apply conferred in § 1158(a) by invoking Section 1158(b). To the contrary, the authority granted by Section 1158(b)(2) must be exercised "consistent with this section." And it is an elemental principle of statutory construction that an "act cannot be held to destroy itself." *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 228 (1998) (quoting *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)). The Government's reading would do just that.[6]

2. The Government next relies on the fact that the BIA has "treated illegal entry as a discretionary factor to consider in the context of individualized asylum adjudications for many years." Opp. 22 (citing *In re Pula*, 19 I. & N. Dec. 467 (BIA 1987)). But the BIA has *not* allowed illegal entry to operate as a categorical bar to asylum. In *Pula*, the alien had "attempted to enter the United States with a fraudulent document." 19 I. & N. Dec. at 474. As the courts of appeals have uniformly recognized,[7] the BIA held that the alien's fraudulent "manner of entry" could be considered as a "discretionary factor," but it specifically noted that the factor "*should not be considered* in such a way that the practical effect is to deny relief in virtually all cases."

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[6] In a similar vein, the Government leans on Judge Leavy's dissent: "[T]here is nothing inconsistent in allowing an application for asylum and categorically denying any possibility of being granted asylum on that application." Opp. 21 (quoting *E. Bay*, No. 18-17274, slip op. at 3 (9th Cir Dec. 7, 2018), ECF No. 10-2). That misstates the issue. Someone who applies for asylum can, of course, be subject to one of the eligibility bars. The question here is whether the Executive Branch can create an eligibility bar premised on the precise characteristic the Congress has instructed *cannot* be the basis for denying someone the right to seek asylum. That question answers itself.

[7] *See Gulla v. Gonzales*, 498 F.3d 911, 917 (9th Cir. 2007) ("[A]n applicant's entry into the United States using false documentation is worth little if any weight in balancing positive and negative factors."); *Hussam F. v. Sessions*, 897 F.3d 707, 718 (6th Cir. 2018) (per curiam) ("[A]lthough the BIA may consider an alien's failure to comply with established immigration procedures, it may not do so to the practical exclusion of all other factors."); *Huang v. I.N.S.*, 436 F.3d 89, 99-100 (2d Cir. 2006) ("The BIA has explicitly cautioned that manner of entry cannot, as a matter of law, suffice as a basis for a discretionary denial of asylum in the absence of other adverse factors."); *Zuh v. Mukasey*, 547 F.3d 504, 511 n.4 (4th Cir. 2008) (similar).

Id. at 473 (emphasis added).[8]

The Government argues that, if the Board can consider manner of entry as a factor in the asylum process, it can create a categorical rule barring entry on the basis of that factor. Opp. 22-23. That simply does not follow. A rule that treats unlawful entry as a *factor* in asylum eligibility does not deny individuals who entered unlawfully the right to seek asylum altogether; at most, it makes it more difficult to obtain relief. But a rule—like this one—that treats manner of entry is a *categorical bar* on asylum eligibility is indistinguishable from a bar on seeking asylum entirely. Indeed, the Government has given the game away by instructing that the Rule be applied before even the statutory limits on applying for asylum, making clear that this limit acts as a virtually unprecedented threshold barrier to seeking asylum. *See* Mot. 13.

3. Trying a different tack, the Government contends that, even if it were unlawful to directly condition eligibility for asylum on entering through a port of arrival, the Rule is valid because it operates indirectly, by conditioning eligibility on violating a presidential proclamation. The Ninth Circuit properly rejected that maneuver. "[T]he Rule and the Proclamation together create an operative rule of decision for asylum eligibility," and Plaintiffs here, as in the Ninth Circuit, "have challenged the Rule as it incorporates the President's Proclamation." *East Bay*, 2018 WL 6428204, at *15. That challenge is plainly authorized by the APA and basic principles of equity. *See id.*; *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996). And because the "operative rule of decision" is unlawful for reasons discussed above, it should be enjoined.

Moreover, the Rule would still be unlawful even if it made aliens ineligible for asylum based solely on their violation of a different proclamation. Section 1158(a) mandates that an

[8] The Government suggests that *Matter of Salim*, 18 I. & N. Dec. 311 (BIA 1982), approved "the categorical exercise of discretion to deny an alien asylum based on his manner of entry," Opp. 22. It did not. It held only that the "fraudulent avoidance of orderly refugee procedures" was an "extremely adverse factor" in the circumstances of that case. *Id*. at 316. And in *Pula* the BIA held that even that approach "place[d] too much emphasis on circumvention of orderly refugee procedures." 19 I. & N. Dec. at 473.

alien be able to seek asylum "irrespective of such alien's status." As the Government does not dispute, multiple Circuits have interpreted that to mean that the Government cannot bar aliens from seeking asylum solely because they are subject to a particular ground of inadmissibility. *R-S-C- v. Sessions*, 869 F.3d 1176, 1183-84 (10th Cir. 2017); *Marincas v. Lewis*, 92 F.3d 195, 201 (3d Cir. 1996). The Rule does just that: It categorically bars from asylum an alien who enters in violation of a proclamation, and thus "violated the immigration laws" in a particular manner. 83 Fed. Reg. at 55,952. The Government barely responds to this point. It says only that "the Proclamation does not affect all illegal entrants nor . . . duplicate any other provision in the INA." Opp. 23. But the fact that the Proclamation "does not affect all illegal entrants" is precisely the point: Together with the Rule, it creates a status-based bar to the right to seek asylum. And the fact that it does not "duplicate any other provision in the INA" does not change the fact that it is a new ground of inadmissibility that relegates a set of asylum seekers to a particular status.

4. Finally, the Rule and Proclamation are inconsistent with the United States' international obligations. *See East Bay*, 2018 WL 6428204, at *16. The Supreme Court has held that the INA must be read in a manner consistent with the Nation's obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6259 ("Protocol"). *Cardoza-Fonseca*, 480 U.S. at 436. In ascertaining the meaning of the Protocol, the Supreme Court and lower courts have drawn "significant guidance" from the Office of the United Nations High Commissioner for Refugees (UNHCR). *Id*. at 438-39 & n.22; *Poradisova v. Gonzales*, 420 F.3d 70, 80 n.5 (2d Cir. 2005). UNHCR has explained in an amicus brief to this Court why the Rule and Proclamation flout the Nation's international obligations, including Article 31(1) of the 1951 Convention, which prohibits states from "impos[ing] penalties, on account of their illegal entry or presence, on refugees who . . . enter or are present in their territory without authorization." 19 U.S.T. at 6275; *see* UNHCR Br. 7-19; Mot. 17.

The Government's responses all miss the mark. First, the Government argues that Article 31(1) is not applicable here. It reasons that Article 31(1)'s prohibition on "penalties" applies to

refugees "coming directly from a territory where their life or freedom was threatened," and here Plaintiffs traveled through Mexico from Honduras. Opp. 24-25. That argument misunderstands the Convention. "Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries," like Plaintiffs here. *R v. Asfaw* [2008] UKHL 31, [19], [50] (appeal taken from Eng.); *see* UNCHR Br. 15 n.4. The Convention does not require a refugee to seek asylum in the first country she passes through. More fundamentally, the INA cannot mean different things for different plaintiffs, and thus the unique circumstances of the individual Plaintiffs here cannot control the application of the *Charming Betsy* canon. *Cf. Clark v. Martinez*, 543 U.S. 371, 381-382 (2005).

Second, the Government claims that the Rule and Proclamation do not impose a "penalty" because they do not "'imprison[] or fine[] aliens.'" Opp. 25 (quoting *Cardoza-Fonseca*, 480 U.S. at 429). But a "penalty" need not be criminal to qualify. "UNHCR's view is that the concept of impermissible 'penalties' in Article 31(1) encompasses civil or administrative penalties as well as criminal ones." UNHCR Br. 15. Most pertinently, an individual "'cannot be denied refugee status—or . . . the opportunity to make a claim for such status through fair assessment procedures—solely because of the way in which that person sought or secured entry into the country of destination.'" *B010 v. Canada*, [2015] 3 S.C.R. 704, 729 (Can.) (quoting Anne T. Gallagher & Fiona David, The International Law of Migrant Smuggling 165 (2014)). Because asylum seekers often are forced by circumstance to enter a country without prior authorization, any other outcome would turn Article 31(1) on its head. As Plaintiffs have already explained, the two cases cited by the Government are not to the contrary. Mot. 18-19.[9]

[9] The Government also suggests that the availability of withholding of removal and CAT protection is sufficient to satisfy the United States' international obligations. Not so. First, the denial of *any* opportunity to apply for asylum still constitutes an unlawful penalty for purposes of Article 31(1). Second, signatories must provide fair and efficient processes to asylum seekers, including an individualized examination of whether the asylum-seeker meets the definition of refuge in the Protocol and Convention. UNCHR Br. 10-11; Handbook on Proc. & Criteria for Determining Refugee Status ¶¶ 189-190, U.N. Doc. HCR/1P/4/ENG/REV.3 (3d ed. 2011). Withholding of removal does not afford that opportunity.

B. The Rule Exceeds The Authority Granted By Section 1158(b)(2)(C).

The Rule also violates the delegation of authority to the Attorney General contained in Section 1158(b)(2)(C). ***First***, it improperly delegates to the President alone the power to establish "limitations and conditions" on eligibility for asylum. The INA confers that power specifically upon the "Attorney General." 8 U.S.C. § 1158(b)(2)(C). The Rule transfers that power to the President: It contains an open-ended, prospective commitment to automatically make any restrictions on entry across the southern border that the President imposes by proclamation into restrictions on asylum eligibility, subject to whatever "exception[s]" the President chooses. 83 Fed. Reg. at 55,952. That contravenes the text of the INA, and would permit an improper end run around the requirements of the APA. Mot. 20-21.

The Government has no response to this argument. Instead, it retreats to a different point: That the proclamation is a lawful suspension of entry. But no one is challenging the lawfulness of the proclamation as an entry suspension. Rather, the point is that the Rule by its own terms gives the President the power to define new limits and conditions on asylum eligibility. Mot. 20. That is directly contrary to the statute. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993) (a "reference to the Attorney General in the statutory text" of the INA "cannot reasonably be construed to describe . . . the President"). The fact that the Rule met the formal requirements of a rulemaking does not cure the non-delegation problem, any more than a statute giving away Congress' lawmaking power to the President would be cured by the fact that the unlawful delegation complied with the procedural requirements of Article I.

Second, the Rule and Proclamation are unlawful because they create a limit on the availability of asylum that is dramatically different than the restrictions specified in the statute itself. The Government counters that the Section 1158(b)(2)(C) "is *not* a residual clause, but a separate, specific grant of authority." Opp. 27. It is not clear what the Government means by that: The provision in question empowers the Attorney General to impose "*additional* limitations and conditions, *consistent with this section*," after enumerating six specific "limitations and conditions" in the very same subsection. 8 U.S.C. § 1158(b)92)(C) (emphases

added). In any event, it is a bedrock principle of administrative law that "the Executive Branch is not permitted to administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988). "A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citations omitted).

The Rule and Proclamation do violence to the structure and coherence of Section 1158. All of the restrictions on asylum in the statute share a key feature: They bar asylum because the alien's presence constitutes a danger to the country, or because the alien has a diminished need for asylum. Mot. 22-23. In this way, the restrictions in Section 1158(b) track international law. The 1951 Convention exempts from its protection any person who "has committed a serious . . . crime outside the country of refuge" or "has been guilty of acts contrary to the purposes and principles of the United Nations." Art. 1(F). Similarly, the non-*refoulement* obligation does not extend to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." *Id.* art. 33(2). The existing statutory bars to eligibility fit that framework. The new eligibility bar created by the Rule and Proclamation does not.

C. The Rule Violates the TVPRA.

The Government mistakenly claims that the Rule is consistent with the Trafficking Victims Protection Reauthorization Act of 2005 ("TVPRA") because it "has no impact on the statutory procedural protections afforded to unaccompanied children under the TVPRA." Opp. 27. While the Rule does not change the procedural protections afforded to unaccompanied children under 8 U.S.C. § 1232 and 6 U.S.C. § 279, relating to removal proceedings and care and custody, the Rule *does* deny unaccompanied children the rights afforded to them under 8 U.S.C. § 1158(b)(3)(C). Specifically, § 1158(b)(3)(C) "gives unaccompanied alien children the right to have their asylum applications reviewed in the first instance by an asylum officer with the

USCIS." *Harmon v. Holder*, 758 F.3d 728, 734 (6th Cir. 2014). The Rule denies unaccompanied children that statutory right. Asylum officers are *required* to deny the asylum claims of unaccompanied children subject to the Rule and Proclamation irrespective of the merits of their claims. *See* Mem. from L. Francis Cissna, USCIS, *Procedural Guidance* (PM-602-0166), at 6 (Nov. 9, 2018), *available at* https://goo.gl/gpwmWt. Any interview that an unaccompanied child subject to the Rule and Proclamation would have with an asylum officer is thus meaningless.

D. The Rule Violates the Administrative Procedure Act.

1. The Rule Did Not Undergo Notice-And-Comment Procedures.

The Rule was also issued in violation of the APA's notice-and-comment requirements. As the Ninth Circuit has explained, the rationales the agencies gave for dispensing with notice and comment were insufficient to trigger either the good cause exception or the foreign affairs exception. *See East Bay*, 2018 WL 6428204, at *18-21. The Government's brief does not show otherwise.

a. The good cause exception excuses notice and comment only "in emergency situations or where delay could result in serious harm." *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). To invoke this "narrowly construe[d]" exception, an agency must affirmatively demonstrate—with "record support," and without any "entitle[ment] to . . . deference"—that notifying the public of the rule would produce harms that are both "imminent[ ]" and sufficiently "serious." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 706-707 (D.C. Cir. 2014) (internal quotation marks omitted). A "speculative[ ]" claim of harm is not sufficient. *Id.* at 706.

The Government contends that the good cause exception was satisfied here because advance notice of the rule might have "encourag[ed] a surge of aliens to enter between ports of entry before the rule took effect." Opp. 37. But as the Ninth Circuit observed, that prediction was entirely "speculative." *East Bay*, 2018 WL 6428204, at *20; *see* Mot. 31-33. The agencies themselves admitted that they "are not in a position to determine how . . . entry proclamations involving the southern border could affect the decision calculus for various categories of aliens

planning to enter the United States through the southern border in the near future." 83 Fed. Reg. at 55,948 (emphasis added). And the agencies did not provide a scrap of "record support" for the counterintuitive assertion that refugees fleeing persecution would alter their plans in meaningful numbers because an asylum rule had been noticed in the Federal Register. *Sorenson*, 755 F.3d at 707. Given that agencies can "frequently assert that someone will take advantage of the situation if advance notice is given," a far more "significant threat" is needed to invoke the good cause exception, if it is "not to become an all purpose escape-clause." *Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1492 (Temp. Emer. Ct. App. 1983).

Moreover, the agencies provided no evidence that a temporary increase in border crossings would have "imminently threaten[ed] life or physical property." *Sorenson*, 755 F.3d at 706-707. Many refugees seeking asylum are women, children, and LGBT individuals from Northern Triangle countries who pose no appreciable threat of violence, and who would undoubtedly face a greater threat of harm if forced to remain in Mexico, where rapes, kidnappings, and other violent crimes against refugees are widespread. Compl. ¶¶ 53-71. The agencies made a generalized assertion that "border crossings" are "dangerous." 83 Fed. Reg. at 55,950; *see* Opp. 37. But the longstanding threat of illegal border crossings—which is at its lowest point in 47 years—is hardly an "emergency." *Mack Trucks Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012). And the agencies provided no factual findings suggesting that individuals seeking asylum specifically would pose a heightened threat of harm. *Sorenson*, 755 F.3d at 706-707.

None of the precedents the Government cites (at 37-38) is apposite. In *Hawaii Helicopter Operators Association v. FAA*, 51 F.3d 212 (9th Cir. 1995), the agency pointed to "accident data" and a "recent escalation of fatal air tour accidents" to demonstrate that there was an "urgent" need to immediately publish a rule limiting air tour operators. *Id.* at 214. In *Jifry*, the Government immediately authorized revocation of airman certificates "upon notification by the TSA that a pilot posed a security threat" because it found that permitting individuals who are security threats to pilot airplanes would raise "concern[s] over the threat of future terrorist acts

involving aircraft in the aftermath of September 11, 2001." 370 F.3d at 455. And in *Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48,877 (Aug. 11, 2004), DHS dispensed with notice-and-comment of new removal rules because a series of border crossing attempts over the preceding 5 months had required the rescue of "hundreds of aliens in distress" and resulted in the discovery of "over 40 aliens who ha[d] died in the attempt to enter the U.S." 69 Fed. Reg. at 48,880. Those rules pointed to evidence and a present threat of severe danger to justify dispensing with notice and comment. This Rule points to neither.

b. The foreign affairs exception also does not apply. As multiple Circuits have explained, that exception does not excuse an agency from following notice-and-comment procedures merely because a rule "implicate[s]" foreign affairs. *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010). Virtually every immigration rule does that. *Id.*; *see Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir. 1980) (per curiam). Rather, an agency must show that following notice-and-comment procedures would "provoke definitely undesirable international consequences," *Yassini*, 618 F.2d at 1360 n.4 (citing S. Rep. No. 79-752, at 13 (1945)), such as by causing the United States to "reneg[e] on international obligations," *Int'l Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1486 (D.C. Cir. 1994), or prolong a diplomatic crisis, *Yassini*, 618 F.2d at 1360.

The Government offers nothing like that here. It claims, in tellingly lukewarm language, that "[t]he rule and proclamation *directly relate to* 'ongoing negotiations with Mexico' " because they "will help 'develop a process'" for denying asylum to aliens crossing Mexico. Opp. 35-36 (emphasis added) (quoting 83 Fed. Reg. at 55,950-51). But the contention that a rule "relate[s] to" a negotiation falls far short of the showing that *publishing the rule* would *harm* foreign affairs, as the foreign affairs exception requires. The Ninth Circuit again said it best: "[T]he Government has not explained how immediate *publication* of the Rule, instead of *announcement* of a proposed rule followed by a thirty-day period of notice and comment, is necessary for negotiations with Mexico." *East Bay*, 2018 WL 6428204, at *19 (emphases in original).

The Government's examples undermine rather than help its position. In *American*

Association of Exporters & Importers Textile & Apparel Group v. United States, 751 F.2d 1239 (Fed. Cir. 1985), the rule under review "carr[ied] out" an international trade agreement, and a delay in publication would have enabled "foreign interests" to dump products in the United States and "plainly . . . hampered" the "President's power to conduct foreign policy." *Id.* at 1247, 1249. Likewise, in *Flights to and From Cuba*, 81 Fed. Reg. 14,948 (Mar. 21, 2016), the rule implemented an agreement that "representatives from the Departments of State and Transportation signed . . . with Cuba" as part of "the President's continued effort to normalize relations between the two countries." *Id.* at 14949, 14952. Both of those rules had what this rule conspicuously lacks: a reason why a delay in publication would have undermined an international agreement or the Nation's foreign affairs.

The Government makes a general plea for deference to the agencies' foreign-policy judgments. Opp. 36-37. But the agencies have offered nothing to defer to. The rule simply contains no claim that immediate publication would incur any adverse foreign affairs consequences. The Government's attorneys belatedly claim that "notice-and-comment rulemaking would slow and limit" negotiations, Opp. 36, but that *post hoc* litigating position is bereft of any citation to the rule or support in the record, and is too tepid even on its own terms to satisfy the exception. *East Bay*, 2018 WL 6428204, at *19-20; *see SEC v. Chenery*, 332 U.S. 194, 196 (1947).

2. The Rule Is Arbitrary And Capricious.

a. The agencies also failed to offer a rational basis for the Rule. As the Government's opposition brief clear, the Rule's "purpose" is essentially twofold. 83 Fed. Reg. at 55,936; *see* Opp. 1, 3, 29 (describing the Rule's purpose). First, the Rule is designed to "encourage . . . aliens to seek admission . . . at ports of entry," thereby reducing the number of illegal entrants and helping effectuate the President's proclamation restricting entry on the southern border. *Id.* Second, the Rule is intended to reduce "strains" on the immigration system, by causing "aliens subject to [the rule]" to be "processed swiftly." *Id.* at 55,935-36.

The problem is that the agencies did not offer a "reasoned basis" for concluding that the

Rule would achieve either objective. *Am. Equity Inv. Life Ins. Co. v.* SEC, 613 F.3d 166, 177 (D.C. Cir. 2010). As to the first rationale, the agencies candidly admitted that they had no idea whether the Rule would deter illegal entry. *East Bay*, 2018 WL 6428204, at *20 (saying this prediction was "speculative"). As the Rule explains, "[t]he Departments are not in a position to determine how . . . entry proclamations involving the southern border could affect the decision calculus for various categories of aliens planning to enter the United States through the southern border in the near future." 83 Fed. Reg. at 55,948 (emphasis added). That is unsurprising, as it is doubtful in the extreme that aliens fleeing persecution and death—who have traversed dangerous conditions in Mexico, who would need to wait weeks or months to be "metered" into a port of entry, and who still have the prospect of withholding of removal or CAT relief if they enter unlawfully—would be meaningfully deterred by the publication of this Rule.

Likewise, the Rule is replete with acknowledgements that its projected cost savings might be negligible or even negative. *See* Mot. 26-29. Among other statements, the agencies admitted that the Rule would shunt aliens into reasonable-fear interviews—which are considerably more time-consuming than credible-fear interviews—and that it was possible that the "grant rates for statutory withholding the reasonable-fear screening process . . . would be *the same* as grant rates for asylum." 83 Fed. Reg. at 55,947 (emphasis added).

The Government claims that it was permitted to "present no evidence" to support the dual predictions on which the rule rests, because the burden rests entirely "on *Plaintiffs*" to rebut them. Opp. 34 (emphasis in original). That is mistaken. Even in situations involving predictive "uncertainty," the arbitrary and capricious standard requires an agency to "explain the evidence which is available" and "offer a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 52 (1983). The agency cannot simply "recite the terms 'substantial uncertainty' as a justification for its actions." *Id.* Here, the agencies rested their rule on little more than the claim that it "could" deter illegal entry and "might" net out with less costs for the Government. 83 Fed. Reg. at 55,947-48.

The Government claims that the Rule is supported by the independent justification that it would ensure "the efficacy" of the President's proclamation restricting entry on the southern border. Opp. 29-30 (quoting 83 Fed. Reg. at 55,940). But that argument crumbles under the weight of the same problems described above. The only way the Rule would supposedly aid the efficacy of the President's proclamation is by "channel[ing] [aliens] to ports of entry." *Id.* (quoting 83 Fed. Reg. at 55,940). And, as just noted, the agencies have offered no rational basis for the prediction that the Rule would accomplish that objective.

The Government also contends that the Rule "restores Congress's aim to expeditiously remove inadmissible persons who do not have meritorious asylum claims." Opp. 32. It is hard to imagine how. The Rule makes no effort to distinguish between individuals with "meritorious asylum claims" and those who lack them; it denies asylum to *every* individual who crosses the southern border outside a port of entry, even individuals like S.M.S.R. and R.S.P.S. who face a grave and credible threat of persecution. The Rule thus thwarts, not advances, Congress's aim of ensuring that aliens with a "significant possibility" of "establish[ing] eligibility for asylum" will not be subject to removal. 8 U.S.C. § 1225(b)(1)(B)(v).[10]

b. In addition to being unreasoned, the Rule also makes eligibility for asylum hinge on "irrelevant" considerations. *Judulang v. Holder*, 565 U.S. 42, 53 (2011). It is a basic precept of administrative law that agencies must base their decisions on "relevant factors." *Id.* In the asylum context, those factors are ones that go to an individual alien's eligibility for asylum—including "the context in which the applicant sought asylum, evidence of past persecution, and humanitarian reasons for granting asylum." *Worku v. Mukasey*, 268 F. App'x 523, 525 (9th Cir. 2008) (citing cases); *see* Mot. 22-24.

[10] The Government cites statistics showing that some aliens found to have credible fear of persecution are later found ineligible for asylum. Opp. 31-32. But the credible-fear standard is *designed* to admit aliens who may not ultimately satisfy the asylum standard. *See* 8 U.S.C. § 1225(b)(1)(B)(v) (defining credible fear of persecution to mean a "*significant possibility* . . . that the alien could establish eligibility for asylum" (emphasis added)). The fact that some aliens pass that standard but do not ultimately receive asylum is an inherent feature of the threshold screening mechanism that Congress enacted, not a flaw for the agencies to correct.

This Rule, however, "conditions an alien's eligibility for asylum on a criterion that has nothing to do with asylum itself." *East Bay*, 2018 WL 6428204, at *16. The fact that an alien entered the country unlawfully plainly says nothing about whether the individual alien is a meritorious candidate for the benefit of asylum. The agencies implicitly concede as much by stating that the same alien could obtain asylum if she subsequently reentered through a port of entry. 83 Fed. Reg. at 55,940.

The Government offers no convincing response. It claims that Section 1158(b)(2)(C) does not itself require the agency to rely on relevant factors. Opp. 34. But that restriction comes from the APA, which applies to all administrative action. In any event, Section 1158(b)(2)(C) expressly states that any limitations must be "consistent with" Section 1158. *See supra* I.B.1. The Government also claims that some statutory bars on asylum have "nothing to do" with fitness to receive asylum. Opp. 34. The sole example it gives refutes that assertion: it bars asylum for aliens who "constitute[] a danger to the community of the United States," 8 U.S.C. § 1158(b)(2)(A)(ii), a quintessential "adverse factor[]" that renders an alien unfit to receive asylum. *Worku*, 268 F. App'x at 525; *cf.* 1951 Convention art. 33(2).

III. The Other TRO And Preliminary Injunction Factors Are Readily Met.

A. The Rule Inflicts Irreparable Harm on Plaintiffs.

Plaintiffs will suffer irreparable if the Rule is implemented. Plaintiffs will immediately become ineligible for asylum, and face an imminent risk of removal to countries in which they face a grave risk of gang violence and death. CAIR Coalition and RAICES will suffer a severe and irremediable blow to their ability to assist asylum-seekers. Mot. 38-41.

The Government observes that S.M.S.R. and R.S.P.S. might not be removed as a result of the Rule. But the remote possibility that plaintiffs might be spared from removal as a result of withholding of removal or CAT would not ameliorate their injury. Both of those forms of relief are substantially more difficult to obtain and confer substantially fewer benefits—including less protection from removal—than asylum. *See* Mot. 6-7. Furthermore, even the risk of removal to a country in which a plaintiff's life would be threatened constitutes irreparable injury. *See, e.g.*,

Kirwa v. U.S. Dep't of Def., 285 F. Supp. 3d 21, 43-44 (D.D.C. 2017); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1504-05 (C.D. Cal. 1988).

The Government dismisses CAIR Coalition's and RAICES's injuries as too insubstantial to be irreparable. But the Government has no answer to the long line of cases holding that organizations suffer irreparable injury from government actions that would "'perceptibly impair[]' [their] programs and 'directly conflict with the organization[s'] mission.'" *Open Communities All. v. Carson*, 286 F. Supp. 3d 148, 178 (D.D.C. 2017) (quoting *League of Women Voters v. Newby*, 838 F.3d 1, 8 (D.D.C. 2016)). CAIR Coalition and RAICES could not restore the damage to their organizational mission—serving asylum seekers—if they were required by the Rule to serve significantly fewer clients. And the loss of an opportunity to comment on the Rule would itself constitute cognizable irreparable injury. *See N. Mariana Islands v. United* States, 686 F. Supp. 2d 7, 17 (D.D.C. 2009); *East Bay Sanctuary Covenant v. Trump*, No. 18-cv-06810-JST, 2018 WL 6053140, at *19 (N.D. Cal. Nov. 19, 2018).

The Government reiterates its assertion that the presence of the *East Bay* injunction somehow cures all of Plaintiffs' injuries. The Government identifies *no* court that has so held—just a series of stay orders largely premised on efficiency considerations—and multiple courts have held otherwise. *See supra* at 7. For good reason: The question under the irreparable harm injury is not whether Plaintiffs might avoid injury in *the presence* of injunctive relief, but whether they "will suffer irreparable harm if an injunction is *not* issued." *Dist. 50, United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 167 (D.C. Cir. 1969).

B. The Balance of Equities and the Public Interest Favor Injunctive Relief.

The balance of equities and public interest likewise favor an injunction. The Executive's "interest in efficient administration of the immigration laws at the border" is shared with the legislature, *Landon v. Plascencia*, 459 U.S. 21, 34 (1982), and there can be no legitimate interest in enforcing an asylum rule that is contrary to the INA. *East Bay Sanctuary Covenant v. Trump*, 2018 WL 6268881, at *5 (N.D. Cal. Nov. 30, 2018). There is also a powerful "public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely

to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009).

On the other side of the scale, this is not a case in which an injunction would intrude on any "lawful use" of agency authority, Opp. 43, or compel new Government action, *East Bay*, 2018 WL 6268881, at *1, *4 n.3 (distinguishing *Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978) (cited at Opp. 43)). Rather, an injunction will maintain the status quo— "the last uncontested status which preceded the pending controversy"—pending resolution of Plaintiffs' claims. *Jacinto-Castanon de Nolasco v. U.S. Immigration & Customs Enf't,* 319 F. Supp. 3d 491, 498 (D.D.C. 2018). And the Government offers no evidence that the Rule would further its purported interest in preventing "needless deaths and crimes associated with human trafficking and alien smuggling." Opp. 43 (quoting 83 Fed. Reg. at 55,950); *see also East Bay*, 2018 WL 6053140, at *19 (rejecting identical allegation for lack of evidentiary support). On the contrary, the President disclaimed any urgency to employ different procedures at the southern border.[11]

IV. Nationwide Injunctive Relief Is Appropriate.

Plaintiffs and the Ninth Circuit have explained in detail why nationwide relief is appropriate. Mot. 43-45; *see East Bay*, 2018 WL 6428204, at *22. The policy at issue here is contrary to the INA. "When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989). Further, "[i]n immigration matters," courts "have consistently recognized the authority of district courts to enjoin unlawful policies on a universal basis." *East Bay*, 2018 WL 6428204, at *22 (citing cases). That policy is particular appropriate in this case, where the Plaintiffs are suing on behalf of a putative class. And narrower relief would not be workable. Mot 44-45.

The Government blithely ignores these cases and arguments. Instead, it asserts—without citation to authority—that "the sole available remedy [is] a stay of the application of the rule" to "the two individual Plaintiffs." Opp. 44. But as noted in the Motion, "traditional administrative

[11] Donald J. Trump (@realDonaldTrump), Twitter (Dec. 11, 2018, 4:12 AM), https://goo.gl/cxjitR ("Our Southern Border is now Secure and will remain that way.").

law principles" run counter to the idea that "named plaintiffs alone should be protected by an injunction." *Harmon*, 878 F.2d at 495 n.21. The Government suggests that preliminary and permanent injunctions are different in this respect, but the Federal Rules make no such distinction, *see* Fed. R. Civ. P. 65, and *Harmon* was itself a preliminary injunction appeal. The Government also suggests that the APA forecloses preliminary relief extending beyond the named plaintiffs. But the provision cited merely provides that a "reviewing court," when "necessary to prevent irreparable injury," "may issue all necessary and appropriate process . . . to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. That language merely codifies background principles of equity, and does not even mention the plaintiff or aggrieved party (notwithstanding the Government's artful use of brackets (at 44)). *See Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942) (noting reviewing courts "customary power to stay" agency action "under review").[12] In short, "universal . . . relief is commonplace in APA cases, promotes uniformity in immigration enforcement, and is necessary to provide the plaintiffs here with complete redress." *East Bay*, 2018 WL 6428204, at *22 (internal quotation marks omitted).[13]

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a temporary restraining order should be granted, to be followed by a preliminary injunction.

[12] *Sampson v. Murray*, 415 U.S. 61 (1974), cited by the Government (at 44), dealt with the narrow question whether interim relief reinstating a discharged Government employee was appropriate. It does not control the question of interim remedies under the APA more broadly.

[13] The Government also claims that, if Plaintiffs prevail on their APA claims, "the remedy . . . would be to remand the case to the agencies." Opp. 44. Not so. "Normally when an agency clearly violates the APA" a court "vacate[s] its action." *Humane Soc'y of the U.S. v. Zinke*, 865 aF.3d 585, 614 (D.C. Cir. 2017). The D.C. Circuit has repeatedly vacated rules upon finding that they failed to comply with notice and comment procedures. *See, e.g.*, *Sorenson*, 755 F.3d at 710.

Dated: December 14, 2018

Respectfully submitted,

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Exhibit 1

DECLARATION OF KAITLIN WELBORN

I, Kaitlin Welborn, declare under penalty of perjury as prescribed in 28 U.S.C. § 1746:

1. The facts contained in this declaration are known personally to me and, if called as a witness, I could and would testify competently thereto under oath. I submit this sworn declaration in support of Plaintiffs' Reply in Support of Motion for Temporary Restraining Order and Preliminary Injunction, filed concurrently herewith.

2. I am counsel for Plaintiffs S.M.S.R., R.S.P.S., Capital Area Immigrants' Rights Coalition, and Refugee and Immigrant Center for Educational and Legal Services, Inc.

3. Attached as Ex. A hereto is a true and correct copy of the Notice to Appear in removal proceedings under Section 240 of the Immigration and Nationality Act ("NTA") that was issued to Plaintiff S.M.S.R. dated November 21, 2018. Except for redactions implemented pursuant to the Court's December 3, 2018 Memorandum and Order, Dkt. 2, and the Local Civil Rules for the U.S. District Court for the District of Columbia, the NTA filed as Ex. A hereto is submitted in the form it was received by counsel for Plaintiffs from Defendant Department of Homeland Security.

4. As shown at p. 1 of Ex. A, the NTA issued to Plaintiff S.M.S.R. indicates that she is ordered to appear before an immigration judge "on TBD (Date) at TBD (Time) to show why [she] should not be removed from the United States."

5. At 1:52 p.m. on December 13, 2018, I called the Executive Office for Immigration Review Automated Case Information Hotline at 1-800-898-7180. I pressed "1" to receive instructions in English. I entered the A# assigned to Plaintiff S.M.S.R. and pressed "1" to confirm that number. I heard the following recorded message: "The A number information you entered did not match a record in the system or the case has not been filed with the

immigration court. Please contact the local Department of Homeland Security, Immigration and Customs Enforcement office, for further information."

6. I repeated the process described in paragraph 5, *supra*, using the A# information for Plaintiff R.S.P.S. and heard the same recorded message.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: December 14, 2018

Washington, D.C.

Kaitlin Welborn

Exhibit A

FAMU

DEPARTMENT OF HOMELAND SECURITY

NOTICE TO APPEAR

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No. [redacted]

In the Matter of:

Respondent: [redacted] currently residing at:

[redacted]

(Number, street, city and ZIP code)

(Area code and phone number)

☐ You are an arriving alien.
☒ You are an alien present in the United States who has not been admitted or paroled. You are an applicant for admission.
☐ You have been admitted to the United States, but are removable for the reasons stated below.

The Department of Homeland Security alleges that:

1) You are not a citizen or national of the United States.
2) You are a native of Honduras and a citizen of Honduras;
3) You entered the United States at an unknown location on or about 11/10/2018;
4) You did not then possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document;
5) You were not then admitted or paroled after inspection by an immigration officer.

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (Act), as amended, as an immigrant who, at the time of application for admission, is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality as required under the regulations issued by the Attorney General under section 211(a) of the Act.

Section 212(a)(6)(A)(i) of the Act, as amended, as an alien present in the United States without being admitted or paroled, or who has arrived in the United States at any time or place other than as designated by the Attorney General.

☒ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8CFR 208.30 ☐ 8CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

Pearsall EOIR, 566 Veterans Drive, Pearsall, TX 78061
(Complete Address of Immigration Court, including Room Number, if any)

on TBD *(Date)* at TBD *(Time)* to show why you should not be removed from the United States based on the charge(s) set forth above.

Ja Nette B. Orendach
Supervisory Asylum Officer
(Signature and Title of Issuing Officer)

NOV 2 1 2018
Date

Dilley, TX
(City and State)

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 1003.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents, which you desire to have considered in connection with your case. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or removable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear of any relief from removal for which you may appear eligible including the privilege of departure voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the DHS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court and the Department of Homeland Security immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the DHS.

Mandatory Duty to Surrender for Removal: If you become subject to a final order of removal, you must surrender for removal to your local DHS office, listed on the internet at http://www.ice.gov/contact/ero, as directed by DHS and required by statute and regulation. Immigration regulations at 8 CFR 1241.1 define when the removal order becomes administratively final. If you are granted voluntary departure and fail to depart the United States as required, fail to post a bond in connection with voluntary departure, or fail to comply with any other condition or term in connection with voluntary departure, you must surrender for removal on the next business day thereafter. If you do not surrender for removal as required, you will be ineligible for all forms of discretionary relief for as long as you remain in the United Stated and for ten years after departure or removal. This means you will be ineligible for asylum, cancellation of removal, voluntary departure, adjustment of status, change of nonimmigrant status, registry, and related waivers for this period. If you do not surrender for removal as required, you may also be criminally prosecuted under section 243 of the Immigration and Nationality Act (the Act).

U.S. Citizenship Claims: If you believe you are a United States citizen, please advise DHS by calling the ICE Law Enforcement Support Center toll free at (855)448-6903.

Request for Prompt Hearing

To expedite a determination in my case, I request this Notice to Appear be filed with the Executive Office of Immigration Review as soon as possible. I waive my right to a 10-day period prior to appearing before an immigration judge and request my hearing be scheduled.

Before: _____

(Signature of Respondent)

_____ Date: _____

(Signature and Title of Immigration Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on _____, in the following manner and in compliance with section 239(a)(1) of the Act.

☐ In person ☐ by certified mail, returned receipt # _____ requested ☐ by regular mail

☐ Attached is a credible fear worksheet.

☐ Attached is a list of organization and attorneys which provide free legal services.

The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

_____ _____

(Signature of Respondent if Personally Served) *(Signature and Title of Officer)*

CERTIFICATE OF SERVICE

I hereby certify that, on December 14, 2018, Plaintiffs' Reply in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and the accompanying declaration were filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

Date: December 14, 2018

/s/ Justin W. Bernick
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